Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-185

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket 92-266
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

Order

Adopted: April 8, 1993 Released: April 9, 1993

By the Commission: Commissioner Marshall not participating.

1. Daniels Cablevision, Inc. and Time Warner Entertainment Co. have filed requests for a stay pending judicial review of our order of April 1, 1993 in this proceeding freezing the rates for cable services, other than premium and pay-per-view service offerings, provided by cable systems subject to regulation under the Cable Act of 1992.[1] Freeze Order, 58 Fed. Reg. 17530 (Apr. 5, 1993). The Freeze Order became effective on April 5, 1993, upon publication in the Federal Register and extends for 120 days. The order was adopted at the same time as, and designed to support implementation of, a Report and Order in this proceeding (FCC 93-177) establishing rules to implement rate regulation of cable service as required under §§3, 9 and 14 the Cable Act of 1992, 47 U.S.C. 543, 532 and 542(c). That Report and Order has not yet been released. The purpose of the freeze is to prohibit cable systems from increasing their aggregate rates during the period between adoption of the rate regulation rules and the time when we expect that they can be effectively implemented by the FCC and local authorities. See Freeze Order at ¶¶3-4.

2. Daniels' motion relies almost exclusively on claims that the Freeze Order unlawfully burdens its First Amendment speech rights. Specifically, Daniels alleges that the Freeze Order is a "content-based restraint on 'press' and 'speech' activity," which bars "cable operators' exercise of editorial discretion in the selection and arrangement" of communications over their cable systems. Daniels Motion at 1-2, 3. As such, Daniels claims, the Freeze Order, "on its face, constitutes an impermissible 'burden' and an unconstitutional prior restraint on communication and on communicative activity under the First Amendment." Id. at 2. Daniels asks the Commission to stay the Freeze Order "pending final administrative and judicial resolution of the substantial constitutional question raised by the agency's action." Id. at 4.

3. Like Daniels, Time Warner alleges that the freeze will impinge upon its First Amendment rights. See Time Warner Motion at 7-8. However, Time Warner also argues (Motion at 3) that the Freeze Order is arbitrary and capri-

---

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

cious because it "will lead to anomalous results creating irreparable injury" in at least two particular situations--where an existing subscriber switches from a less expensive to a more expensive tier of regulated service and where the cable system "enhance[s] the value of existing regulated services by adding channels, either because of added channel capacity due to a rebuild or because of a new affiliation with a cable programming service."

4. We deny both motions for stay. Daniels' constitutional claim is based upon a mischaracterization of the nature of the Freeze Order and does not justify the extraordinary relief Daniels seeks. First, contrary to Daniels' misstatement, the Freeze Order, on its face, imposes no content-based restriction on speech or any burden on the exercise of editorial discretion. Rather, the order simply prohibits--for a short period of 120 days--aggregate increases above the rates that the cable companies, as previously unregulated entities, had voluntarily set for their services as of the date the freeze begins. This freeze applies without regard to the content of the cable services and, notably, does not preclude cable operators from repackaging the services they provide and restructuring their rate design as long as the "average monthly subscriber bill," calculated across all regulated services, does not increase. Freeze Order at ¶4 & n.7.

5. In addition, the Commission committed to "consider lifting this freeze for a particular cable operator if it can show that the freeze would impose severe economic hardship." Freeze Order at n.6. Neither Daniels nor Time Warner has made any attempt to invoke this procedure by making a particularized showing of economic hardship.[2] Given this waiver procedure, and the fact that the frozen rates were voluntarily established in a non-competitive environment, we find no basis for the claim that the freeze would have any impact on the exercise of First Amendment rights at all.

6. Finally, the purpose of the Freeze Order is unrelated to the suppression or promotion of a particular viewpoint. Rather the order simply helps to ensure, consistent with the Cable Act of 1992, that rates for cable services are reasonable. Freeze Order at ¶3 & n.10 (*citing* 47 U.S.C. 543(b)(1) & (h)). Thus, to the extent that the freeze implicates free speech concerns at all, it demonstrably is not content based,[3] but rather lawful

---

[2] Indeed, Daniels has not alleged that it would suffer any monetary loss as a result of the freeze. Even if Daniels had made such allegations, it is difficult to imagine that a showing could be made that any monetary loss occasioned by freezing for 120 days rates that previously had been unregulated would meet the standard for irreparable injury. Courts have held that mere monetary losses, unless they threaten the very existence of the movant's business, do not constitute irreparable injury for purpose of staying an agency order. See, e.g., Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C.Cir. 1985).

[3] See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral" where, as here, "it is justified without reference to the content of the regulated speech"); Home Box Office, Inc. v. FCC, 567 F.2d 9, 47 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) ("the important inquiry here . . . turns on the purpose for which government regulates").

content-neutral economic regulation of the type that consistently has been found to survive constitutional scrutiny.[4]

7. We do believe, however, that Time Warner's claim that the freeze will lead to anomalous results warrants clarification of the Freeze Order. Time Warner asserts that the cap on the "average monthly subscriber bill" set out in the Freeze Order will have the consequence of forcing cable operators to prohibit customers from upgrading from less expensive to more expensive services, or forcing the cable operators not to levy the increased charges that would otherwise be associated with such an upgrade. Time Warner Motion at 3. Otherwise, Time Warner asserts, the "average monthly subscriber bill" would increase, without any change in rate schedules, simply by virtue of the customers' voluntary decisions to purchase an existing, more expensive service package. Id. Time Warner also claims that the freeze will effectively prevent cable operators from offering additional channels beyond those available prior to the freeze, because even though the provision of those additional channels would increase the cable operators' costs, the cable operators would be prohibited from charging for those additional channels. Time Warner Motion at 3-4.

8. We did not intend in the Freeze Order to mandate these results. To the extent that it may be read in such a manner, we clarify the order as set forth below.[5] The purpose of the order was to "protect consumers" against rate increases while "permit[ting] cable operators to make reasonable changes in service offerings . . . ." Freeze Order at ¶4. The average monthly bill limit was intended to permit changes in individual rate components while constraining increases in overall rate levels. Given that purpose, a cable operator that makes no changes in its rates or services after April 5, 1993 will not be found in violation of the freeze even if its "average monthly subscriber bill" increases as a result, for example, of Time Warner's hypothetical situation of voluntary subscriber upgrading. Thus, if the specific rates in question were "in effect"[6] on the effective date of the Freeze Order, changes

---

[4] See Associated Press v. United States, 326 U.S. 1 (1945); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 689, 800-02 (1979); Storer Cable Communications v. City of Montgomery, 806 F. Supp. 1518, 1557-62 (M.D. Ala. 1992).

[5] Time Warner acknowledged that "if the Commission were to issue a clarification avoiding the anomalous results set forth in the text, this would moot TWE's appeal to the extent that it attacks these aspects of the Freeze Order." Time Warner Motion at 5 n.2.

[6] Rates "in effect" include rates for all services being offered by a system and actually being charged subscribers prior to the effective date of the Freeze Order. Included are rates that are in effect with respect to some subscribers, even if they are subject to a staggered billing process, regardless of whether all subscribers had received bills on the effective date of the order. It is not intended that the freeze result in different rates being charged system subscribers for the same services based on billing cycles. Similarly, if portions of a system have been upgraded and higher rates are in effect for expanded service offerings, that upgrading process may continue with the rates in effect for this service being charged to subscribers as they convert to new levels of service.

in subscriber demand that alter the average bill will not be interpreted as conflicting with the Freeze Order. Further, as explicitly set forth in that order, we anticipate that there will be changes in rate structures during the freeze period. Indeed, one of the functions of the freeze is to permit rate structure changes to take place in an environment where rate increases are not also being implemented. In this respect, the freeze was designed so that, as the substantive rate regulation process commences, much of the restructuring process will have taken place and subscribers, local regulatory authorities, and the Commission may focus on regulating or rolling back rates to the correct rate level. We view these kinds of rate structure changes as not calculated or designed to increase the "average monthly subscriber bill," and they, accordingly, are not prohibited under the Freeze Order. Moreover, although overall increases in existing rate levels are precluded during the freeze period, contrary to Time Warner's assertion, the addition of new services is not foreclosed. New services may be added even if they increase subscriber demand for a higher priced service tier as long as the rate constraint is observed. Alternatively, a new service may be provided and charged for as an entirely new, optional service, unrelated to any existing service tier or existing rate.[7]

9. We do not agree with Time Warner's suggestion that the freeze on the "average monthly subscriber bill" will have the undesirable effect of either delaying new services or forcing a cable operator to accept significantly increased costs associated with those new services. This is particularly true in light of the limited duration of the Freeze Order. In this regard, we note that Time Warner's claim of irreparable injury is based exclusively on hypothetical possibilities and is completely unsupported by specific factual data. As discussed above, we have expressly provided for lifting the freeze in individual cases where "severe economic harm" is shown.

10. In the Freeze Order, we found that the 120-day freeze served the public interest by preventing cable operators from unfairly raising rates during the interim period until the Act could be fully implemented through a detailed regulatory structure that we have adopted but which has not yet taken effect. Freeze Order at ¶3. Neither Daniels nor Time Warner has provided any reason to reassess that public interest finding.

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), that the motions for stay filed by Daniels Cablevision, Inc. and Time Warner Entertainment Co. are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

---

[7] The Freeze Order also does not impair the ability of cable operators to offer and charge for new "premium" services or other programming services offered on an a la carte basis.